Karnam Singh a/l Gubakhus Singh & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(SH)-78–02 OF 2016, B-05(SH)-80–02 OF 2016 AND B-05(SH)-82–02 OF 2016
AHMADI ASNAWI, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
28 NOVEMBER 2018

Criminal Law — Appeal — Appeal against conviction and sentence — Appellants charged with offences under s 3 of the Kidnapping Act 1961 and s 365 of the Penal Code read together with s 34 of the Code — Appellants convicted and sentenced to life imprisonment and two strokes of rattan each for first charge — Appellants convicted and sentenced to five years imprisonment for second charge — Whether trial judge had misdirected himself — Whether appellants had been positively identified — Whether common intention proven — Kidnapping Act 1961 s 3 — Penal Code ss 34 & 365

The appellants together with two others were charged with two offences, firstly for abducting for ransom under s 3 of the Kidnapping Act 1961 ('the Act') read together with s 34 of the Penal Code ('the Code') and secondly, for abducting with intent to wrongfully confine a person under s 365 of the Code read together with s 34 of the Code. At the end of the prosecution's case, the trial judge found that the prosecution had proven prima facie case only against the appellants, as such, the other two accused were acquitted and discharged without their defence being called. In their defence, the appellants did not deny that Lim Kian Hwa ('SP2') and Mohd Laithaff bin Thaj Mohamed ('SP3') were kidnapped and confined in the empty house, but the appellants claimed that their intention was only to rob SP2 and not to kidnap him for ransom. They further claimed that one Palani was the mastermind behind the robbery. At the end of the trial, the appellants were found guilty of both charges. For the first charge, they were sentenced to life imprisonment and two strokes of the rattan each whilst for the second charge, they were each sentenced to five years imprisonment with effect from their dates of arrest and the imprisonment sentence was ordered to run concurrently. Dissatisfied with the decision, the appellants filed the present appeals. The appellants submitted that they had not been positively identified by SP2. The appellants further argued that common intention was not proved.

Held, dismissing the appeals:

(1) It was true that SP2 failed to identify the first appellant at the first identification parade and only did so at the second identification parade,

but SP2 had explained that this was because the first appellant was unshaven at the first identification parade whereas he was clean shaven at the time he abducted SP2 and SP3. The learned trial judge accepted SP2's explanation. There was therefore no basis for the court to accede to the first appellant's argument that SP2's dock identification of the first appellant ought to have been rejected by the learned trial judge. In addition, the first appellant's involvement in the offence was also proven via the evidence given by the police that RM520,000 of the ransom money was found in the first appellant's possession at the time of his arrest (see paras 41–43).

(2) Although SP2 could not identify the second and third appellants in court during the trial, he had positively identified them at the identification parades, which was conducted eight days after he was kidnapped, when the incident was still fresh in his mind. SP2's explanation for his failure to identify the second and third appellants in court was that the incident happened long before he gave evidence. The explanation was also accepted by the learned trial judge. In any event, SP2's failed dock identification was not fatal to the prosecution's case as the second and third appellants' identities had been established by independent DNA evidence (see paras 44–45).

(3) From the proved facts, it was clear that the common intention of the group of people who kidnapped SP2 and SP3 was to commit the two offences charged. It was clearly their pre-arranged plan that SP2 was to be lured to the isolated feeder road and there to be abducted and confined in the empty house for the purpose of demanding ransom from his family. SP3 was not their target but the fact remained that he was confined in the empty house against his wish. Thus, even if the court was to assume that only the first appellant demanded the RM1m ransom, the second and third appellants would equally be liable by operation of s 34 of the Code. Likewise for the second charge, the fact that SP3 was tied up and confined in the empty house after his abduction clearly showed that their common intention was to commit the offence specified in the second charge (see paras 53–54, 58 & 60).

[Bahasa Malaysia summary

Perayu-perayu bersama dua orang lain telah dituduh dengan dua kesalahan, pertama kerana menculik untuk wang pampasan di bawah s 3 Akta Penculikan 1961 ('Akta tersebut') dibaca bersama s 34 Kanun Keseksaan ('Kanun tersebut') dan kedua, kerana menculik dengan niat untuk menahan seseorang secara bersalah di bawah s 365 Kanun tersebut di baca bersama s 34 Kanun tersebut. Di akhir kes pendakwaan, hakim perbicaraan mendapati bahawa pendakwaan mempunyai kes prima facie hanya terhadap perayu-perayu, oleh itu, dua tertuduh yang lain itu telah dilepas dan dibebaskan tanpa pembelaan mereka dipanggil. Dalam pembelaan mereka, perayu-perayu tidak menafikan

bahawa Lim Kian Hwa ('SP2') dan Mohd Laithaff bin Thaj Mohamed ('SP3') telah diculik dan ditahan dalam rumah kosong, tetapi perayu-perayu mendakwa bahawa niat mereka hanya untuk merompak SP2 dan tidak menculiknya untuk wang pampasan. Mereka selanjutnya mendakwa bahawa seorang bernama Palani merupakan ketua dalam rompakan itu. Di akhir perbicaraan, perayu-perayu didapati bersalah kerana kedua-dua pertuduhan. Untuk pertuduhan pertama, mereka dihukum penjara seumur hidup dan dua sebatan rotan setiap seorang manakala untuk pertuduhan kedua, mereka masing-masing dihukum penjara selama lima tahun berkuat kuasa dari tarikh tangkapan mereka dan hukuman penjara tersebut diperintahkan berjalan serentak. Tidak berpuas hati dengan keputusan itu, perayu-perayu telah memfailkan rayuan-rayuan ini. Perayu-perayu berhujah bahawa mereka tidak dikenal pasti secara positif oleh SP2. Perayu-perayu selanjutnya berhujah bahawa niat bersama tidak dibuktikan.

Diputuskan, menolak rayuan-rayuan:

(1) Ia adalah benar bahawa SP2 gagal mengenal pasti perayu pertama semasa barisan pengecaman pertama dan hanya dapat berbuat demikain semasa barisan pengecaman kedua, tetapi SP2 telah menjelaskan bahawa ini adalah kerana perayu pertama berjambang semasa barisan pengecaman pertama manakala dia tidak mempunyai jambang pada masa dia menculik SP2 dan SP3. Hakim perbicaraan yang bijaksana telah menerima penjelasan SP2. Oleh demikian, mahkamah tidak mempunyai asas untuk bersetuju dengan hujah perayu pertama bahawa pengecaman SP2 oleh perayu pertama patut ditolak oleh hakim perbicaraan yang bijaksana. Selain itu, penglibatan perayu pertama dalam kesalahan itu juga telah dibuktikan melalui keterangan yang diberikan oleh polis di mana wang pampasan berjumlah RM520,000 telah dijumpai dalam milikan perayu pertama pada masa tangkapannya (lihat perenggan 41–43).

(2) Walaupun SP2 tidak dapat mengenal pasti perayu-perayu kedua dan ketiga di mahkamah semasa perbicaraan, dia telah mengenal pasti mereka secara positif semasa barisan pengecaman tersebut, yang dijalankan lapan hari selepas dia diculik, yang mana kejadian itu masih jelas dalam fikiranya. Penjelasan SP2 untuk kegagalannya mengenal pasti perayu-perayu kedua dan ketiga di mahkamah adalah kejadian itu telah lama berlaku sebelum dia memberi keterangan. Penjelasan itu juga telah diterima oleh hakim perbicaraan yang bijaksana. Dalam apa keadaan, kegagalan SP2 semasa barisan pengecaman itu tidak memudaratkan kes pendakwaan kerana identiti perayu-perayu kedua dan ketiga tleah dibuktikan melalui keterangan DNA yang berasingan (lihat perenggan 44–45).

(3) Berdasarkan fakta yang dibuktikan, ia adalah jelas bahawa niat bersama

A sekumpulan orang yang menculik SP2 dan SP3 adalah untuk melakukan dua kesalahan yang dituduh. Adalah jelas mereka telah telah merancang terlebih dahulu untuk membawa SP2 ke jalan yang sunyi dan diculik di sama dan ditahan di rumah kosong bagi tujuan menuntut wang pampasan daripada keluarganya. SP3 bukan sasaran mereka tetapi fakta
B masih kekal bahawa dia telah ditahan di rumah kosong itu tanpa kehendaknya. Oleh itu, jika pun mahkamah mengandaikan bahawa perayu pertama sahaja yang menuntut wang pampasan RM1 juta, perayu-perayu kedua dan ketiga juga sama bertanggungjawab menurut s 34 Kanun tersebut. Begitu juga dengan pertuduhan kedua, fakta
C bahawa SP3 telah diikat dan ditahan dalam rumah kosong itu selepas penculikannya jelas menunjukkan bahawa niat bersama mereka adalah untuk melakukan kesalahan yang dinyatkaan dalam pertuduhan kedua (lihat perenggan 53–54, 58 & 60).]

D **Notes**

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

E *Balachandran v PP* [2005] 2 MLJ 301, FC (refd)
Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
R v Adams [1996] 2 Cr App Rep 467, CA (refd)
F *R v Hanratty* [2002] 3 All ER 534, CA (refd)

Legislation referred to

Criminal Procedure Code ss 173(h)(iii), 180(3), (4), 182A(1)
Kidnapping Act 1961 s 3
G Penal Code ss 34, 365

Appeal from: Criminal Case No 45C-74–04 of 2013 (High Court, Shah Alam)

H *Nik Mohamed Ikhwan bin Mahamud (Nik Ikhwan & Co) for the first appellant.*
T Vijayadran (Grace S Nathan with him) (T Vijay & Co) for the second appellant.
P Visnuvarman (The Chambers of Visnu) for the third appellant.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

I

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] There were three appeals before us, filed separately by the three appellants. We heard the appeals together at the conclusion of which we

dismissed all three appeals by a unanimous decision. These are the grounds of our decision. A

[2] The appellants together with two others were charged with two offences, one for abducting for ransom under s 3 of the Kidnapping Act 1961 ('the Kidnapping Act') and the other for abducting with intent to wrongfully confine a person under s 365 of the Penal Code. The charges were as follows: B

> First Charge
>
> Bahawa kamu bersama-sama dengan beberapa orang yang masih bebas pada 11 Jun, 2012 jam lebih kurang 2.45 petang dikawasan Kampung Ayer Hitam Rawang di dalam Daerah Gombak di dalam Negeri Selangor Darul Ehsan dengan niat telah menahan dan mengurung secara tidak sah seorang lelaki bernama Lim Kian Hwa (No. kad pengenalan: 811020-14-6365) untuk mendapat wang tebusan RM1,000,000. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 3 Akta Culik 1961 dan boleh dihukum dibawah peruntukan yang sama dibaca bersama Seksyen 34 Kanun Keseksaan. C D
>
> Second Charge
>
> Bahawa kamu bersama-sama dengan beberapa orang yang masih bebas pada 11 Jun, 2012 jam lebih kurang 2.45 petang di kawasan Kampung Ayer Hitam Rawang di dalam Daerah Gombak di dalam Negeri Selangor Darul Ehsan dengan niat telah menculik seorang lelaki bernama Mohd Laithaff bin Thaj Mohamed (No. kad pengenalan: 670908-10-5367) dengan niat hendak menyebabkan Mohd Laithaff bin Thaj Mohamed dikurung dengan sulit dan dengan salah, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 365 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan. E F

[3] Section 3 of the Kidnapping Act, which is relevant to the first charge, provides:

> Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person, shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping. G

[4] Thus, on conviction for an offence under this provision, the offender is liable to be punished with death if the trial judge so determines, depending of course on the circumstances under which the offence was committed. The alternative punishment for the offence is imprisonment for life, with the option of whipping as an additional punishment. H

[5] In relation to the second charge, s 365 of the Penal Code provides as follows: I

> Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment for a term

A which may extend to seven years, and shall also be liable to fine.

[6] At the conclusion of the trial, the appellants were found guilty of both charges. For the first charge, they were sentenced to life imprisonment and two strokes of the *rotan* each whilst for the second charge, they were each sentenced to five years imprisonment with effect from their dates of arrest. The imprisonment sentence was ordered to run concurrently. Neither side appealed against the sentence passed.

[7] Briefly the prosecution case against the appellants was as follows. On 11 June 2012 at about 9.30am, Lim Kian Hwa ('SP2'), who worked as a transport manager (the first appellant described him as 'tauke pasir') received a phone call from someone asking him to come over to discuss the sale of sand that SP2 was keen to purchase.

[8] Suspecting nothing sinister, SP2 agreed to meet the caller at the pre-arranged location, which was at CCM Mineral Sdn Bhd factory, Rawang. Since the caller was unknown to SP2, he brought along his worker Mohd Laithaff bin Thaj Mohamed ('SP3') to accompany him. SP3 was the victim in respect of the second charge.

[9] On their arrival at the factory at about 12.30pm, a male Indian arrived in a Wira Aeroback and approached SP2's car. This person, later identified as the first appellant, asked SP2 to follow his car to the place where the sand deposits were supposed to be located.

[10] SP2 followed the Wira Aeroback from behind. He was led through an isolated sandy feeder road, as can be seen from the photos at pp 13 and 22 (Vol 3A) of the appeal record. As they drove further in, SP2 noticed that another Wira Aeroback was already waiting for them. SP2 began to feel uneasy and he became scared. He reversed his Hilux with the intention of turning back but was unable to do so as there was a car blocking him at the rear and another in front. He was trapped and had nowhere to escape.

[11] Two persons rushed out from the car in front and another three from the car behind. They were armed with a knife, a steering lock, a long cane and a big hammer. They smashed the side windows of the Hilux using the big hammer and steering lock and forcefully pulled SP2 and SP3 out of the vehicle.

[12] Once outside the Hilux, SP2 and SP3 were pinned down and assaulted with the steering lock, hammer and *rotan*. Their hands and legs were tied with cable and they were blindfolded. SP2's handset was also taken away. They were then brought to an empty house in one of the Wira Aerobacks.

[13] Upon entering the empty house, SP2 was ordered to sit down and his shoes removed. Someone hit his bare feet with a cane and only stopped when he screamed in pain. They then removed his blindfold and handed to him his handset. According to SP2, there were about six persons in the empty house. He was told not to look around or be killed if he dared to.

[14] One of the kidnappers, namely the first appellant, instructed SP2 to call his elder brother Lim Kian Piang ('SP11') to tell him that he and SP3 had been kidnapped and that RM2m was the price for his release. No money was demanded for SP3's release. SP2 did as instructed.

[15] While SP2 was on the phone with SP11, the first appellant grabbed the handset and spoke to SP11, telling him to come up with the RM2m ransom. SP11 was given until 7pm to do so. At the same time, he was warned not to make any police report.

[16] On the same day at about 3.30pm, SP11 received SMS from handset No 010–4243915. It was a message from the first appellant, who repeated his demand for the ransom sum of RM2m. However, after some negotiations through several phone calls, the sum was reduced to RM1m.

[17] During the night, SP2 called SP11 again, telling him to hurry up with the payment as he had been assaulted by the kidnappers. What transpired prior to this was that in his attempt to escape, SP2 managed to untie the cable that was used to tie his hands but was found out by one of the kidnappers. As a result, he was slapped several times and the cable on his hands tightened.

[18] At dawn, SP2 and SP3 were transferred to another location. At this location, one of the kidnappers placed a knife at SP2's neck and told him that his elder brother did not love him as he had not delivered the ransom money. SP2 pleaded with him that his brother loved him and that payment would be made soon.

[19] SP11 lodged a police report on the same day. By then SP2's parents had also managed to come up with the RM1m ransom. The police swung into action. Photos of the RM1m, all in RM50 denominations, were taken and their serial numbers recorded. They were put in two bags, one containing RM870,000 and the other containing RM130,000.

[20] SP11 then contacted the first appellant. He was instructed by the first appellant to drop the money at a marked location by the roadside near an Indian temple at Batang Berjuntai. SP11 did as instructed but he only dropped the bag containing the RM870,000. He said he forgot to drop the bag containing the RM130,000 as he panicked.

A **[21]** SP11 then waited in the vicinity of the Indian temple. At 9pm he received a call from SP2 asking him to pick him up. Apparently SP2 had set himself free. According to SP2, before SP11 fetched him, it was already dark and when he saw no one inside the house where he and SP3 were confined, he took the opportunity to escape. What SP2 was unaware of was that the B kidnappers had obtained the ransom money and had left the house.

[22] Five persons were arrested by the police in connection with this case, including the three appellants. The first appellant was positively identified by SP2 and SP3 as the person who met them before they were kidnapped at C Rawang and as one of the persons who guarded them at the empty house. According to SP2, the first appellant was armed with a knife while guarding them. The second and third appellants had also been identified by SP2 and SP3.

D **[23]** At the close of the prosecution case, the other two accused charged together with the appellants were acquitted and discharged without their defence being called as the learned trial judge found that no prima facie case had been established against them. No appeal was filed by the prosecution E against the decision.

[24] As for the three appellants, the learned trial judge was satisfied that a prima facie case had been established against them. Accordingly, they were called upon to enter on their defence. On the evidence, we were of the view that F the learned trial judge was right in calling for their defence.

[25] Under the Criminal Procedure Code ('the CPC'), once a prima facie case has been made out against the accused, he must be called upon to enter on his defence. This is stipulated by s 180(3) of the CPC, which caters for trials in G the High Court, as follows:

> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

H **[26]** A prima facie case is defined by s 180(4) of the CPC in the following terms:

> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

I **[27]** The equivalent provision for trials in the magistrates court is s 173(h)(iii) of the CPC. Since the term 'prima facie case' has been given a statutory definition, it is not permissible for the court to resort to any other definition in determining whether a prima facie case has been established by

the prosecution, unless the definition coincides and is not inconsistent with the statutory meaning. A

[28] To reiterate, where credible evidence has been adduced by the prosecution to prove every ingredient of the offence at the close of its case, and such evidence has been accepted by the trial judge, the accused must be called upon to enter on his defence. B

[29] Credible evidence means evidence that is capable of belief given by a credible witness. To entitle the accused to an acquittal where a prima facie case had been established against him, he must rebut or explain the evidence already established against him by the prosecution at the close of its case. C

[30] This does not mean however that the accused has a legal duty to prove his case. Unless any presumption of law applies against him toprove any particular fact which forms an essential ingredient of the offence, he has no duty to prove or to disprove anything. All that he needs to do in order to succeed in his defence is to discharge his evidential burden of merely to cast a reasonable doubt in the court's mind as to his guilt. However, the doubt must be a real and reasonable doubt and not just any doubt conjured up to deflect the course of justice. D E

[31] In deciding whether the accused has succeeded in casting a reasonable doubt in the prosecution case, the trial judge must consider all the evidence adduced. For this purpose, he must not focus his mind only to the explanation given by the accused and close his mind to the evidence adduced by the prosecution. F

[32] The law requires the trial judge to test the accused's explanation against and in the light of the evidence already established by the prosecution at the close of its case, without reviewing his findings of fact on such evidence. This is what s 182A(1) of the CPC means when it provides: G

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. H

[33] The reason why the trial judge must keep the prosecution evidence in mind when considering whether the defence explanation has cast a reasonable doubt in the prosecution case is not hard to understand. This is because in finding that a prima facie case had been established against the accused at the close of the prosecution case, the trial judge had subjected the prosecution evidence to a maximum evaluation as required by law and had found the witnesses to be credible witnesses. Therefore, the strength of the evidence must I

have been such that if unrebutted or unexplained would warrant the accused's conviction.

[34] Thus, if the accused remains silent in the face of such evidence, the prosecution evidence will remain unrebutted or unexplained. In that situation, the court will have no choice but to convict and sentence him: see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 where the Federal Court held at p 316:

> However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[35] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, Augustine Paul J (as he then was) in dealing with the same issue opined at p 62:

> The degree of proof required to establish a prima facie case is easiest demonstrated by asking ourselves what the court should do after the defence is called, if the accused elects to remain silent, calls no evidence and cannot come up with any good reason why the earlier conclusion was wrong ... Thus unqualified, and unrebutted the court has to convict on the very same material.

[36] When called upon to enter their defence, the appellants chose to give evidence on oath. They did not deny that SP2 and SP3 were kidnapped and confined in the empty house, but claimed that their intention was only to rob SP2 and not to kidnap him for ransom. They claimed that one 'Palani' (since then deceased) was the mastermind behind the robbery.

[37] Now, since the appellants did not deny that they did in fact kidnap SP2, albeit for the purpose of robbing him as they claimed, no reasonable doubt could possibly have been raised by any of them as to their identities. What was left for the learned trial judge to determine was whether their explanation had cast a reasonable doubt in the prosecution case that the abduction of SP2 was for the purpose of demanding for ransom.

[38] Having given due consideration to their defence, the learned trial judge came to the following conclusion, which also contained his reasons for finding that a prima facie case had been established against the appellants:

> Saya berpandangan bahawa pembelaan kesemua tertuduh di dalam kes ini tidak lebih daripada hanya satu penafian sahaja. Pembelaan berbentuk penafian bukanlah satu pembelaan yang dapat diterima untuk membebaskan tertuduh-tertuduh dari pertuduhan.

Saya telah menimbangkan kesemua keterangan pendakwaan dan pembelaan secara komprehensif dan 'total'. Saya meyakini keterangan SP2 yakni salah seorang daripada mangsa. SP2 menyatakan bahawa beliau dapat mengecam secara positif tertuduh pertama sebagai orang yang telah mengheret beliau keluar daripada kereta dengan tertuduh pertama diketika itu sedang memegang pisau. Menurut SP2 lagi, tertuduh pertama adalah orang yang menyuruh beliau menelefon abangnya, SP11 bagi meminta wang tebusan sebanyak RM2 juta. Tertuduh pertama juga dicamkan oleh SP2 sebagai orang yang mengawal SP2 sewaktu SP2 tidur. Manakala keterangan daripada SP14 iaitu pegawai yang menangkap tertuduh pertama menyatakan ketika ditangkap, tertuduh pertama seorang diri di dalam kereta WGN 7278 bersama dengan wang tunai berjumlah RM520,000. No siri duit yang dirampas ini didapati 'tally' dengan No siri wang tebusan. Seterusnya, sejumlah wang juga dapat dirampas dikediaman tertuduh kedua dimana setelah perbandingan dibuat, No siri wang rampasan adalah juga 'tally' dengan No siri wang tebusan. Selain itu, DNA yang ditemui pada puntung rokok ditempat SP2 dan SP3 dikurung adalah sepadan dengan DNA tertuduh sepertimana laporan DNA yang dikemukakan. Manakala bagi tertuduh keempat, sewaktu beliau ditangkap oleh SP12, tiada apa-apa perkara yang boleh menghubungkaitkan beliau dengan kes ini. Walaubagaimanapun, terdapat DNA yang sepadan dengan DNA tertuduh keempat ditemui terdapat pada puntung rokok yang dikutip ditempat dimana mangsa dikurung. Seterusnya, keterlibatan tertuduh keempat ini diperkuatkan lagi apabila terdapatnya DNA tertuduh keempat pada baju yang dipakai oleh SP2.

Ringkasnya, keterangan-keterangan ini menjurus kepada inferens bahawa tertuduh pertama, tertuduh kedua dan tertuduh keempat adalah secara aktif terlibat dalam menculik mangsa dan bukannya melakukan samun seperti mana pembelaan mereka. Keterangan-keterangan yang ditampilkan menunjukkan bahawa mereka berada di tempat kejadian dan mereka mempunyai pengetahuan bahawa SP2 dan SP3 dikurung disitu.

Berdasarkan kepada hakikat tersebut, saya memutuskan pembelaan ketiga-tiga tertuduh adalah penafian kosong semata-mata. Palani hanyalah dijadikan sebagai alasan dan sebagai tempat untuk diletakkan segala kesalahan kerana mereka tahu Palani telah meninggal dunia dan siasatan tidak boleh dijalankan ke atas Palani. Hal ehwal keseluruhan kes menunjukkan bahawa ketiga-tiga tertuduh terlibat dengan kesalahan menculik terhadap SP2 bagi mendapatkan wang tebusan RM1 juta dan mengurung secara salah terhadap SP3.

[39] The 'tertuduh keempat' referred to in the above passages is the third appellant Viknes Varan a/l Shumugam. On the material before him, we found nothing wrong with the findings of fact made by the learned trial judge, contrary to the submissions of learned counsel for the appellants.

[40] It is clear that his findings were based on actual evidence before him and he had not misdirected himself in any way, either in law or on the facts. There was in the circumstances no reason for us to disturb his findings in the exercise

of our appellate criminal jurisdiction. It would be against principle for us to do so.

[41] It was strenuously argued that the appellants had not been positively identified by SP2. We found no merit in the argument. It is true that SP2 failed to identify the first appellant at the first identification parade and only did so at the second identification parade, but SP2 had explained that this was because the first appellant was unshaven at the first identification parade whereas he was clean shaven at the time he abducted SP2 and SP3. The learned trial judge accepted SP2's explanation.

[42] There was therefore no basis for us to accede to learned counsel's argument that SP2's dock identification of the first appellant ought to have been rejected by the learned trial judge. But what is more important is that proof of the first appellant's involvement in the offence came not only from SP2's testimony.

[43] Such proof also came from evidence given by the police that RM520,000 of the ransom money was found in the first appellant's possession at the time of his arrest. This is independent corroboration of SP2's evidence on the identity of the first appellant and his role in the commission of the offence, not that his evidence requires corroboration in law.

[44] As for the identification of second and third appellants, although SP2 could not identify them in court during the trial, he had positively identified them at the identification parades, which was conducted eight days after he was kidnapped, when the incident was still fresh in his mind. SP2's explanation for his failure to identify the second and third appellants in court was that the incident happened long before he gave evidence. The explanation was also accepted by the learned trial judge.

[45] In any event, we do not think that SP2's failed dock identification is fatal to the prosecution case as the second and third appellants' identities had been established by independent DNA evidence. Forensic evidence shows that the second and third appellants' DNA profiles were found on the cigarette butts collected by the police at or in the vicinity of the empty house where SP2 and SP3 were confined. The third appellant's DNA was even found on the shirt that SP2 was wearing at the time of his abduction.

[46] Apart from the DNA profiles of the second and third appellants on the cigarette butts, the DNA profile of SP3 was also found on the cigarette butt which contained the DNA profile of the third appellant. This shows SP3 was telling the truth when he testified that he shared a cigarette with the third appellant while he was being confined in the empty house.

[47] The presence of the second and third appellants' DNA profiles on the cigarette butts and the third appellant's DNA profile on SP2's shirt provides potent corroboration of SP2's and SP3's evidence that the second and third appellants were *perticeps criminis* in this crime.

[48] DNA evidence by itself could provide the basis for a conviction, provided all other ingredients of the offence had been established. In *R v Adams* [1996] 2 Cr App Rep 467, the appellant was charged with rape and the prosecution case rested entirely on expert evidence in relation to the DNA profile obtained from semen on a high vaginal swab taken from the victim.

[49] The evidence was challenged by the defence. After going through the trial judge's evaluation of the evidence, the Court of Appeal, which is the apex court in England, observed as follows at p 469:

> In the judgment of this Court the approach was unimpeachable. No flaw in the exercise of the judge's discretion is demonstrated. *There is no principle of law that DNA evidence is in itself incapable of establishing guilt*. (Emphasis added.)

[50] *R v Hanratty* [2002] 3 All ER 534 is another decision of the English Court of Appeal. In that case, the prosecution relied on DNA evidence to prove the rapist-cum-murderer's guilt. This was how the court dealt with the matter through Lord Woof CJ:

> [83] On behalf of the prosecution, Mr Sweeney QC argues that the DNA evidence is admissible and we should rely on it, if we are satisfied that it establishes James Hanratty's responsibility for the murder, as part of our reasoning for rejecting each of the grounds of appeal. Mr Sweeney suggests that the DNA evidence clearly establishes the correctness of the decision of the jury and proves beyond doubt that there has been no miscarriage of justice.
>
> [109] Following the order of the court on 17 October 2000, James Hanratty's body was exhumed and samples taken from which it has been possible for Dr Whitaker of the Forensic Science Laboratory to state with what a non-scientist would regard as equivalent to absolute certainty (or almost absolute certainty as makes no difference) that the DNA profile recovered from the fragment of knickers and the DNA profile recovered from the mucus staining on the handkerchief have come from James Hanratty. That is not in dispute and, indeed, it is conceded by Mr Mansfield on behalf of the appellant that, should it transpire that all possibility of contamination can be excluded, the DNA evidence points conclusively to James Hanratty having been both the murderer and the rapist.
>
> [127] Accordingly, we reject the evidence of Dr Evison where it is in conflict with the additional evidence of the Respondents, agreeing as we do with the submission made by Mr Sweeney *that the DNA evidence standing alone is certain proof of James Hanratty's guilt*. (Emphasis added.)

[51] The DNA profiles of the second and third appellants found at the scene

of crime and the third appellant's DNA profile on SP2's shirt could not have been a mere co-incidence. The evidence placed them squarely at the scene of crime. If that is not strong enough circumstantial evidence to connect them with the abduction and confinement of SP2 and SP3, the seizure of the marked notes in various amounts from each of them provides irrefutable proof of their involvement in the crime.

[52] Thus, learned counsel's contention that the identities of the second and third appellants had not been established due to SP2's and SP3's failure to identify them in court was of no consequence.

[53] It was also the appellants' contention that common intention was not proved. We disagreed. From the proved facts, it is clear that the common intention of the group of people who kidnapped SP2 and SP3 (and that includes the three appellants) was to commit the two offences charged, regardless of the fact that the two persons charged together with the appellants were acquitted and discharged at the close of the prosecution case.

[54] It was clearly their pre-arranged plan that SP2 was to be lured to the isolated feeder road and there to be abducted and confined in the empty house for the purpose of demanding ransom from his family. SP3 was not their target but the fact remains that he was confined in the empty house against his wish. He was at the wrong place with the wrong person at the wrong time. It is trite law that common intention can be formed on the spur of the moment. This applies to the abduction of SP3.

[55] For ease of reference we reproduce below s 34 of the Penal Code:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[56] There is sufficient adjective law on what constitutes common intention under s 34 of the Penal Code. The law reports are replete with high authorities on this particular area of the law. The latest decision of the Federal Court on the point (to our knowledge) is the case of *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 where it was held by unanimous decision of a panel of five members that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed.

[57] It was further held by the apex court that as long as there is common intention to commit a criminal act which resulted in the commission of the

crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime.

[58] Thus, even if we were to assume for a moment that only the first appellant demanded the RM1m ransom from SP11, the second and third appellants would equally be liable by operation of s 34 of the Penal Code.

[59] There is no ring of truth in the appellants' claim that their intention was only to rob SP2 and not to kidnap him for ransom. This claim goes against all probabilities of the case. It has to be a figment of their imagination as SP2 was never robbed of his money. The RM1m was demanded and obtained as ransom for SP2's release and not money that was robbed from him.

[60] Likewise for the second charge, the fact that SP3 was tied up and confined in the empty house after his abduction clearly shows that their common intention was to commit the offence specified in the second charge.

[61] It was for all the reasons aforementioned that we found no merit in the appeals by the appellants and we accordingly affirmed their convictions and sentence. We were satisfied that the learned trial judge was right in finding that the prosecution had proved its case beyond any reasonable doubt and that all three appellants failed to cast any reasonable doubt as to their guilt.

Appeals dismissed.

Reported by Dzulqarnain Ab Fatar